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Kenneth M. Dorros

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STOP AND FRISK IN NEW YORK: FLEEING SUSPECTS AND ANONYMOUS TIPS

I. Introduction

Police-citizen street encounters are inherently troublesome because they must necessarily be reviewed on a case-by-case basis.¹ Nevertheless, New York's proliferation of inharmonious stop-and-frisk decisions necessitates a critical examination of certain patterns of inconsistency.²

This Note focuses on two areas of uncertainty: the authority to stop and frisk fleeing suspects³ and the appropriate grounds to stop and frisk a suspect based on an anonymous tip.⁴ Four years ago, the ambiguities of a controversial New York Court of Appeals decision⁵ threw the lower courts into disarray as to the standard of suspicion necessary to justify a police officer's pursuit of a fleeing suspect.⁶ This

1. *People v. Chestnut*, 51 N.Y.2d 14, 19, 409 N.E.2d 958, 960, 431 N.Y.S.2d 485, 488 (1980). See *infra* note 98 and accompanying text concerning the necessity for case-by-case determinations.

Such street encounters comprise the area of law commonly known as stop and frisk. Generally, stop-and-frisk situations arise when a law enforcement officer either observes or is informed of particularly suspicious circumstances and approaches a suspect in a detentive manner. Such a "stop" may lead to a "frisk,"—a pat-down of the suspect's outer clothing—if the officer has a justified reasonable belief that the suspect is armed. *Terry v. Ohio*, 392 U.S. 1 (1968).

2. *Abramovsky, Stop and Frisk*, 188 N.Y.L.J. 1, Sept. 15, 1982, at 1, col. 1. "At present, it may be argued that there is no discernible pattern in the decisions of the New York Court of Appeals The various Appellate Divisions are in equal disarray." *Id.* at 3, col. 1.

3. See *infra* notes 62-100 and accompanying text for a discussion of this issue.

4. See *infra* notes 101-64 and accompanying text for a discussion of this issue. The term "anonymous tips" applies to the ways in which police officers receive information concerning criminal activity through sources whose reliability is unverified. Most of these tips come from unknown persons who approach police officers in the street and from radio runs from police headquarters, which often originate from anonymous phone calls, such as those received through New York City's "911" emergency telephone hotline.

5. See *People v. Howard*, 50 N.Y.2d 583, 408 N.E.2d 908, 430 N.Y.S.2d 578 (4-3 decision), *cert. denied*, 449 U.S. 1023 (1980).

6. In *Howard*, the court of appeals ruled that pursuit is justified only upon probable cause that a crime has been or is being committed. *Id.* at 586, 408 N.E.2d at 910, 430 N.Y.S.2d at 581. However, in dictum, the court characterized pursuit in such a way as to suggest that a lesser degree of suspicion—reasonable suspicion—might suffice. *Id.* at 590, 408 N.E.2d at 913, 430 N.Y.S.2d at 583. See *infra* note 75 and accompanying text concerning this ambiguous language. See *infra* notes 15 & 16 for discussions of probable cause and the more lenient standard of reasonable suspicion. Some lower courts have disregarded the strict holding of *Howard*. Others have adhered to *Howard's* dictum in upholding pursuit based upon reasonable suspicion.

Note attempts to clarify those ambiguities and suggests a more reasonable approach for adoption by the court of appeals.⁷ This Note also explores the extent to which an anonymous tip can serve as a predicate for a stop-and-frisk action by a police officer.⁸ This issue requires discussion of police officers' corroboration of such unverified information. This Note identifies two apparently conflicting lines of cases in New York⁹ and offers a recommendation to resolve this conflict.¹⁰

The authority for stop-and-frisk procedure is both constitutional¹¹ and statutory.¹² New York's Criminal Procedure Law codifies the reasonableness standard set forth by the Supreme Court in *Terry v. Ohio*,¹³ in which the Court recognized the need for police initiated confrontations with private citizens based upon less than probable

See *infra* notes 79-84 and accompanying text for a discussion of these cases. See also Preiser, *Confrontations Initiated by the Police on Less than Probable Cause*, 45 ALBANY L. REV. 57, 76-77 (1980); Oberly, *The Policeman's Duty and the Law Pertaining to Citizen Encounters*, 8 PEPPERDINE L. REV. 653, 654-57 (1981) for commentary concerning *Howard*.

7. See *infra* notes 99-100 and accompanying text concerning this recommendation.

8. See *supra* note 4.

9. See *infra* notes 129-48 and accompanying text for a discussion of these cases.

10. See *infra* notes 161-64 and accompanying text concerning this recommendation.

11. *Terry v. Ohio*, 392 U.S. 1 (1968). On the same day, the Supreme Court decided *Sibron v. New York* and *Peters v. New York*, 392 U.S. 40 (1968). Together, these decisions serve as the constitutional basis for stop-and-frisk cases.

12. New York's statutory authority for stop and frisk is New York Criminal Procedure Law, Section 140.50 (McKinney 1981). The relevant portions read:

1. [A] police officer may stop a person in a public place located within the geographical area of such officer's employment when he *reasonably suspects* that such person is committing, has committed or is about to commit either (a) a felony or (b) a misdemeanor defined in the penal law, and may demand of him his name, address and an explanation of his conduct.

2. [Certain court officers] may stop a person in or about the courtroom . . . when [they] *reasonably suspect* that such person is committing, has committed or is about to commit either (a) a felony or (b) a misdemeanor . . . and may demand of him his name, address and an explanation of his conduct.

3. When upon stopping a person under circumstances prescribed in subdivisions one and two a police officer or court officer . . . *reasonably suspects* that he is in danger of physical injury, he may search such person for a deadly weapon or any instrument, article or substance readily capable of causing serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons . . .

N.Y. CRIM. PROC. LAW § 140.50 (McKinney 1981) (emphasis added). There is also common-law authority for less severe intrusions based upon lesser degrees of suspicion. See *infra* notes 53-59 and accompanying text.

13. 392 U.S. 1 (1968).

cause,¹⁴ the constitutional standard for issuance of search and arrest warrants.¹⁵ This lesser degree of cause needed for initiating a stop and frisk is known as "reasonable suspicion."¹⁶ A third and less intrusive level of police initiated interference with citizens, the common-law right of inquiry, has been articulated by the New York Court of Appeals.¹⁷ The predicate for this common-law right is "founded suspicion" of criminal activity.¹⁸ The grey area between the apparently indiscernible terms "reasonable" and "founded" suspicion is discussed in the context of cases involving anonymous tips.

II. Historical Background

A. The Supreme Court Decisions: *Terry* and its Progeny

The Supreme Court first squarely addressed the issue of stop-and-frisk in *Terry v. Ohio*.¹⁹ In that case, a Cleveland plainclothes detective with thirty years of patrol experience²⁰ observed two men apparently "casing" a jewelry store for a daytime robbery.²¹ After approximately twenty minutes of observation, the officer approached the men, identified himself and asked for their names. Upon receiving an unintelligible response, he spun defendant Terry around and pat-

14. *Id.* at 26-27.

15. Probable cause eludes precise definition. See *Brinegar v. United States*, 338 U.S. 160 (1949). In *Brinegar*, the Court explained that "[i]n dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life . . ." *Id.* at 175. Moreover, probable cause exists when a police officer is aware of reasonably trustworthy facts and circumstances which are "sufficient in themselves to warrant a man of reasonable caution in the belief that" a crime has been or is being committed. *Carroll v. United States*, 267 U.S. 132, 162 (1925); accord *Brinegar*, 338 U.S. at 175-76.

16. One commentator has described reasonable suspicion as "the pint-sized version of probable cause." Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349, 414 (1974).

17. *People v. DeBour*, 40 N.Y.2d 210, 223, 352 N.E.2d 562, 572, 386 N.Y.S.2d 375, 385 (1976).

18. *Id.* at 223, 382 N.E.2d at 572, 386 N.Y.S.2d at 385.

19. See *supra* note 11.

20. 392 U.S. at 5. Courts consistently have attached significance to the extent of a police officer's experience. See, e.g., *United States v. Cortez*, 449 U.S. 411, 414, *on remand*, 653 F.2d 1253 (9th Cir. 1981), *cert. denied*, 455 U.S. 923 (1982); *United States v. Martinez-Gonzalez*, 686 F.2d 93, 99 (2d Cir. 1982) (citing *Cortez*); *United States v. Oates*, 560 F.2d 45, 49 (2d Cir. 1977), *aff'd without op.*, 591 F.2d 1332 (2d Cir. 1978).

21. 392 U.S. at 6 (each man individually walked up to window, peered in and walked by, repeating sequence a dozen times, while pausing periodically to confer with other).

ted his breast pocket. He felt a pistol, removed it and arrested Terry for carrying a concealed weapon.²²

In upholding the officer's actions, the Court made it clear that such a detentive confrontation was sufficiently intrusive to trigger the protections of the fourth amendment, even though it was initiated on less than probable cause.²³ Consequently, the officer's conduct was evaluated according to the fourth amendment's reasonableness standard, by which the need to search and seize must be balanced against the invasion that it entails.²⁴ To justify the challenged conduct, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."²⁵ In evaluating the officer's conduct, the Court focused on a dual inquiry—"whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."²⁶ Significantly, the Court restricted use of the protective frisk to circumstances in which a prudent person reasonably

22. *Id.* at 7.

23. In writing for the majority, Chief Justice Warren stated:

[i]t is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person.

Id. at 16. Furthermore, a frisk of the outer clothing was deemed to be a "search." *Id.* The fourth amendment reads as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The New York Constitution's counterpart is identical except for minor differences in form. See N.Y. CONST. art 1, § 12.

It should be noted that "even where the language of the two constitutions is *precisely* the same, there need be no uniformity of interpretation," since the states may provide their citizens with more protective rights than those guaranteed under the federal Constitution. *Esler v. Walters*, 56 N.Y.2d 306, 317, 437 N.E.2d 1090, 1096, 452 N.Y.S.2d 333, 339 (1982) (Fuchsberg, J., dissenting) (citations omitted).

In *United States v. Mendenhall*, 446 U.S. 544 (1980), the Supreme Court attempted to define further the point at which a confrontation becomes a detentive stop, within the meaning of *Terry*. According to the Court, factors to be considered in making such a determination include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled . . ." *Id.* at 554. Ultimately, the Court stated, it must be decided whether "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.*

24. 392 U.S. at 21 (citing *Camara v. Municipal Court*, 387 U.S. 523, 534-35, 536-37 (1967) (balancing test applied to search of residence by health inspector)).

25. *Id.* at 21. This is the reasonable suspicion standard. See also *supra* note 16.

26. 392 U.S. at 20.

would suspect his safety or the safety of others to be jeopardized by the threat of an armed suspect.²⁷

People v. Sibron,²⁸ a companion case to *Terry*, is illustrative of the Court's proscription against searches based upon inarticulable hunches. In *Sibron*, a Brooklyn patrolman noticed a suspect conversing with several known drug addicts for the duration of his eight-hour shift. The patrolman approached the suspect declaring, "You know what I'm after." The suspect mumbled a response and reached into his pocket. Immediately, the patrolman thrust his hand into the pocket and seized several glassine envelopes containing heroin.²⁹ In reversing the New York Court of Appeals, the Supreme Court held the heroin to be inadmissible as the product of an unlawful search for evidence, rather than a self-protective search for weapons.³⁰ Significantly, the Court was critical of the patrolman's failure to attempt a less intrusive "initial limited exploration for arms," as in *Terry*.³¹ Finally, it is interesting to note Justice Harlan's concurring opinion, in which he remarked that the right to frisk should be "immediate and automatic" where a suspect is stopped for suspicion of a violent crime."³²

27. *Id.* at 32-33. While the Court was careful to strictly circumscribe use of the frisk, it nevertheless clarified the standard of reasonableness by stating that an "officer need not be absolutely certain that the individual is armed" *Id.* at 27.

28. 392 U.S. 40 (1968).

29. *Id.* at 45-46.

30. *Id.* at 63-64.

31. 392 U.S. at 65. Many courts have echoed this view by recognizing that, when there is reasonable suspicion that a suspect is armed, a limited pat-down is a minimally intrusive method of executing an effective search. *See, e.g.,* *People v. Love*, 92 A.D.2d 551, 553, 459 N.Y.S.2d 122, 124 (2d Dep't 1983) (touching outside of jacket or coat pocket deemed minimally intrusive); *People v. Rivera*, 78 A.D.2d 327, 329-30, 434 N.Y.S.2d 681, 683 (1st Dep't 1981); *cf. People v. Fripp*, 58 N.Y.2d 907, 911-12, 447 N.E.2d 53, 55, 460 N.Y.S.2d 505, 507 (1983) (Fuchsberg, J., dissenting) (search of leather handbag thought to contain gun deemed *less* intrusive than pat-down of defendant's clothing); *People v. Fernandez*, 58 N.Y.2d 791, 793, 445 N.E.2d 639, 641, 459 N.Y.S.2d 256, 258 (1983) (intrusion was minimal where officer seized gun as result of touching shirt held by defendant); *People v. Smith*, 93 A.D.2d 432, 434, 462 N.Y.S.2d 30, 30 (1st Dep't 1983) (where bulge at defendant's waist revealed outline of gun handle, it was minimally intrusive to reach under defendant's shirt and grab weapon).

32. 392 U.S. at 33. Unfortunately, he did not attempt to decide whether possession of narcotics falls into such a category. *Id.* However, law enforcement officers have been favored on this issue. *See, e.g.,* *United States v. Ceballos*, 654 F.2d 177, 188 (2d Cir. 1981) (Meskill, J., dissenting) ("[t]he law enforcement officials assigned to enforce our narcotics laws risk their lives daily and must be accorded sufficient latitude reasonably and lawfully to minimize the danger that incessantly confronts them"). Judge Meskill cited *United States v. Oates*, 560 F.2d 45, 62 (2d Cir. 1977) for

Since *Terry*, the Court has offered little clarification of the troublesome concept of reasonableness³³ in the context of stop and frisk. However, two decisions underscore the Court's pragmatism in maintaining a single, general standard. In *Dunaway v. New York*,³⁴ the Court rejected a "multifactor balancing test," in favor of "[a] single familiar standard . . . essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."³⁵ More recently, in *United States v. Cortez*,³⁶ the Court took notice of the problematic, open-ended terminology set forth in *Terry*, but offered little in the way of remedial guidelines.³⁷ The following excerpt reflects the Court's firmly rooted conviction that a generalized standard should be employed on a case-by-case basis, despite the inherent shortcomings of such a standard:

Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like 'articulable reasons' and 'founded suspicion' are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the *essence* of all that has been written is that *the totality of circumstances—the whole picture*—must be taken into account.³⁸

Two Supreme Court decisions are crucial to a discussion of anonymous tips. In *Adams v. Williams*,³⁹ the Court commented, in dicta,

the proposition that "[m]ention hardly needs to be made of the infamous role that violence has played in the illicit narcotics trade." 654 F.2d at 188.

33. Reasonableness is the touchstone by which police conduct is measured under the fourth amendment. *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973) (warrantless car search upheld in absence of probable cause after police towed car to private garage).

34. 442 U.S. 200 (1979).

35. *Id.* at 213-14. In rejecting the multifactor balancing test, the Court cautioned that the protections of the fourth amendment "could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the 'often competitive enterprise of ferreting out crime.'" *Id.* (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

36. 449 U.S. 411 (1981).

37. *Id.* at 417.

38. *Id.* (emphasis added). *Cortez* went further than *Dunaway* in emphasizing the necessity for a practical standard, susceptible to immediate and unencumbered application by police. It also reiterated the importance of fully appreciating the perspective of the law enforcement officer: "[T]he evidence . . . collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement . . ." *Id.* at 418. From such evidence an officer must be allowed to make "inferences and deductions that might well elude an untrained person." *Id.*

39. 407 U.S. 143 (1972).

on the extent to which an informant's tip may justify a stop and frisk.⁴⁰ *Adams* concerned the nighttime seizure of a gun by a Connecticut police officer on patrol in a high-crime area. The officer, acting upon information supplied by a known informant, approached the car of an allegedly armed man and asked him to get out. When the man instead rolled down the window, the officer reached into the car and extracted a gun from the suspect's waistband, exactly where the informant had said it would be.⁴¹ Although the Court upheld the seizure, it cautioned that "a stronger case [against the defendant] obtains" where the informant is known than "in the case of an anonymous telephone tip."⁴²

Since *Adams*, a sharply divided Court has refused to grant certiorari on the issue of "whether an anonymous tip may furnish reasonable suspicion for an investigatory detention," thereby leaving "the state and lower federal courts in conflict and confusion."⁴³ In New York, the court of appeals has sanctioned *Terry* confrontations based solely upon anonymous tips.⁴⁴ However, New York decisions are in conflict over the extent to which such tips must be corroborated by police officers.⁴⁵

In the context of probable cause, anonymous tips were until recently subject to scrutiny under the complex *Aguilar-Spinelli* test, which focused on the "veracity" and "basis of knowledge" of persons

40. *Id.* at 148.

41. *Id.* at 144-45. A subsequent search incident to arrest yielded heroin, a machete and a second revolver. *Id.*

42. *Id.* at 146. Writing for a six-to-three majority, Justice Rehnquist observed that some tips are so "lacking in indicia of reliability" as to make police action unwarranted or, at least, to "require further investigation before a forcible stop . . . would be authorized." In contrast, where "the victim of a street crime seeks immediate police aid and gives a description of his assailant, or when a credible informant warns of a specific impending crime . . . an appropriate police response" should be permitted. *Id.* at 147.

43. See *White v. United States*, 454 U.S. 924 (1981) (White, J., dissenting, with Brennan and Marshall, JJ.) (denying certiorari from 648 F.2d 29 (D.C. Cir. 1981)). See also *Jernigan v. Louisiana*, 446 U.S. 958 (1980) (denying certiorari from 377 So.2d 1222 (La. 1979)). For several breakdowns of how the various federal circuits and states stand on this issue, see *White*, 454 U.S. at 925-26; *Jernigan*, 377 So.2d at 1225; Comment, *Anonymous Tips, Corroboration, and Probable Cause: Reconciling The Spinelli/Draper Dichotomy* In *Illinois v. Gates*, 20 AM. CRIM. L. REV. 99, 106-07 (1982).

44. *People v. Taggart*, 20 N.Y.2d 335, 341, 229 N.E.2d 581, 585, 283 N.Y.S.2d 1, 7 (1967) (anonymous call that man with gun was at particular corner provided reasonable suspicion for frisk).

45. See *infra* notes 129-48 and accompanying text for a discussion of this conflict.

supplying hearsay information.⁴⁶ This test, however, was overruled in *Illinois v. Gates*.⁴⁷ In place of the two-pronged test, the Court reverted to "the totality of the circumstances analysis that traditionally has informed probable cause determinations."⁴⁸ Quoting *Adams*, the Court recognized that "rigid legal rules are ill-suited" to the diverse area of anonymous tips which "may vary greatly in their value and reliability."⁴⁹ Although *Gates* applies to determinations of magistrates,⁵⁰ rather than those of law enforcement officers, it nevertheless serves to reiterate the Court's common-sense approach to fourth amendment regulation.⁵¹

B. New York's Sliding Scale Under *De Bour*

While New York has codified *Terry* in its Criminal Procedure Law,⁵² the New York Court of Appeals has formulated a more expansive approach to stop-and-frisk law. In *People v. De Bour*,⁵³ the court created a sliding scale "gradation of permissible police authority with

46. See *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964).

47. 51 U.S.L.W. 4709 (1983).

48. *Id.* at 4716 (citing *Jones v. United States*, 362 U.S. 257 (1960); *United States v. Ventresca*, 380 U.S. 102 (1965); *Brinegar v. United States*, 338 U.S. 160 (1949)). "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." Under *Gates*, "veracity" and "basis of knowledge" are to be considered together, rather than independently. *Id.*

49. 51 U.S.L.W. at 4714 (quoting *Adams v. Williams*, 407 U.S. 143, 147 (1972)).

50. This is because the facts of *Gates* concerned the obtaining of a search warrant. 51 U.S.L.W. 4709.

51. "[T]his flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires . . ." *Id.* at 4716.

New York has yet to consider the applicability of *Gates* to its state constitution. See, e.g., *People v. Cantre*, 95 A.D.2d 522, 525, 467 N.Y.S.2d 263, 266 (2d Dep't 1983) (judge had probable cause to issue search warrant since informant was reliable and his information was credible).

52. See *supra* note 12 and accompanying text regarding New York's Criminal Procedure Law.

53. 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976) (*People v. La Pene*, companion case).

In *De Bour*, the court denied suppression of a gun seized by police. The police initiated a street confrontation with the defendant late at night in an area where drug traffic was prevalent. The defendant, who had been walking toward two patrolmen, crossed the street when he came within 30 to 40 feet of them. Upon noticing a bulge under De Bour's jacket, the officers asked him to unzipper his coat, whereupon the defendant complied and the weapon was seized from his waistband. *Id.* at 213, 352 N.E.2d at 565, 386 N.Y.S.2d at 378. The defendant was not frisked in the technical sense, as there was no physical intrusion. However, the officers' conduct

respect to encounters with citizens in public places."⁵⁴ According to the court, various levels of police intrusion are justified by "precipitating and attendant factors [as they] increase in weight and competence."⁵⁵ Thus, at a minimum, police may approach a citizen to request information based upon "some objective credible reason for [the] interference not necessarily indicative of criminality."⁵⁶ A more intrusive common-law right of inquiry exists if there is "a founded suspicion that criminal activity is afoot."⁵⁷ Such a suspicion entitles police to seek "explanatory information [in a manner falling] short of forcible seizure." A *Terry* stop and detention, which is governed by statute, is permissible upon reasonable suspicion of past, present or future commission of a crime. A frisk is a permissible corollary to the detentive stop for questioning "if the officer reasonably suspects that he is in danger of physical injury by virtue of the detainee being armed." Finally, an arrest is warranted upon "probable cause to believe that [a] person has committed a crime"⁵⁸

One of the most troublesome aspects of *De Bour* has been the grey area between the common-law right of inquiry and the interferences authorized by *Terry*.⁵⁹ Despite the *De Bour* court's delineation of distinct categories of intrusiveness, the court did not lose sight of the paramount consideration of reasonableness.⁶⁰ Turning now to the first area of analysis herein, this Note will address the confusion among

arguably might have amounted to what might be termed a constructive frisk in light of the court of appeals' own recognition of a "tendency to submit to the badge" *Id.* at 219, 352 N.E.2d at 569, 386 N.Y.S.2d at 382.

La Pene concerned the unlawful frisk and seizure of a gun from a suspect in a bar who fit the general description of wearing a red shirt. 40 N.Y.2d at 221, 352 N.E.2d at 571, 386 N.Y.S.2d at 384.

54. 40 N.Y.2d at 223, 352 N.E.2d at 572, 386 N.Y.S.2d at 385.

55. *Id.* at 223, 352 N.E.2d at 571, 386 N.Y.S.2d at 384.

56. *Id.* at 223, 352 N.E.2d at 572, 386 N.Y.S.2d at 384.

57. *Id.* at 223, 352 N.E.2d at 572, 386 N.Y.S.2d at 385.

58. *Id.* See also *supra* note 6 for a discussion of probable cause.

59. One commentator has queried, "can we expect that [police officers] will be able to grasp the nuances that are involved in differentiating between founded suspicion and reasonable suspicion . . . ?" See Kelder, *Criminal Procedure*, 30 SYRACUSE L. REV. 15, 78-79 (1979).

De Bour, in citing *Terry*, acknowledged that the extent of the common law authority to make inquiries "may defy precise definition" Yet, the court noted certain factors that must be considered: "[A] policeman's right to request information while discharging his law enforcement duties will hinge on the manner and intensity of the interference, the gravity of the crime involved and the circumstances attending the encounter." 40 N.Y.2d at 219, 352 N.E.2d at 569, 386 N.Y.S.2d at 382.

60. *Id.* at 218, 352 N.E.2d at 568, 386 N.Y.S.2d at 381. "The overriding requirement of reasonableness, in any event, must prevail." *Id.*

New York courts regarding whether a police officer can properly pursue a fleeing suspect absent probable cause.⁶¹

III. Problems of Inconsistency in New York

A. The Factor of Flight

In the controversial case of *People v. Howard*,⁶² a sharply divided court of appeals apparently rejected the right of police to pursue a suspect absent probable cause.⁶³ Although *Howard* has been virtually dissected by commentators,⁶⁴ lower courts remain confused as to the significance of a suspect's flight upon a police officer's approach.⁶⁵ Ambiguities in the court's language have allowed lower courts to stray from the harshness of *Howard's* holding.⁶⁶ Thus, there is a need for resolution of these ambiguities by the court of appeals.

The events in *Howard* concerned two plainclothes policemen's day-time observation of a man carrying a woman's vanity case.⁶⁷ Upon the officers' approach, defendant Howard acted anxiously and evasively.⁶⁸ When the officers identified themselves and asked to speak to him, Howard ignored them and walked away. When the officers approached him again, he started to run, clutching the case to his chest "like a football." After fiercely pursuing Howard on foot, the officers cornered him in a basement, whereupon Howard threw the vanity case into a pile of junk in the corner of the room. After finding a revolver and heroin inside the case, the officers arrested Howard.⁶⁹

The majority's conclusion⁷⁰ relied heavily upon *People v. Schanbarger*⁷¹ in which the court held that, taken alone, a suspect's failure

61. As the scope of this Note is relatively narrow, for a more encompassing study of stop-and-frisk law, see 3 LaFave, *SEARCH AND SEIZURE*, § 9.3.

62. 50 N.Y.2d 583, 408 N.E.2d 908, 430 N.Y.S.2d 578, *cert. denied*, 449 U.S. 1023 (1980).

63. *Id.* at 586, 408 N.E.2d at 910, 430 N.Y.S.2d at 581.

64. See Abramovsky, *supra* note 2, at 3, col. 1; Oberly, *The Policeman's Duty and the Law Pertaining to Citizen Encounters*, 8 PEPPERDINE L. REV. 653, 654-57 (1981); see Preiser, *supra* note 6, at 83-89.

65. See *infra* notes 78-83 and accompanying text concerning these cases.

66. See *infra* note 75 and accompanying text concerning these ambiguities.

67. 50 N.Y.2d at 587, 408 N.E.2d at 911, 430 N.Y.S.2d at 581.

68. *Id.* Until plainclothes policemen identify themselves, a suspect is justified in acting evasively toward such strangers. *People v. Towers*, 49 A.D.2d 839, 839, 373 N.Y.S.2d 593, 595 (1st Dep't 1975) (mere fact that suspect fled from unidentified plainclothesman did not create reasonable suspicion).

69. 50 N.Y.2d at 587, 408 N.E.2d at 911, 430 N.Y.S.2d at 581-82.

70. The dissent ridiculed the holding as "border[ing] on the absurd." *Id.* at 595, 408 N.E.2d at 916, 430 N.Y.S.2d at 587.

71. 24 N.Y.2d 288, 300 N.Y.S.2d 100 (1969).

to respond to a police officer's questioning regarding the suspect's name and destination cannot constitute a crime.⁷² The *Howard* court also found that it was "at best equivocal" that the defendant was carrying a woman's vanity case.⁷³ Thus, the court held that the absence of indicia of criminality prevented "the limited detention that is involved in pursuit."⁷⁴

Disharmony among subsequent lower court decisions arguably can be traced to ambiguous language in *Howard*. While the court held that *probable cause* was the requisite for pursuing an unresponsive suspect, the opinion characterized pursuit as a "limited detention." From this characterization, it might be inferred that mere *reasonable suspicion* should be the requisite for pursuit.⁷⁵ The dissent failed to take issue with this ambiguity. Rather than argue that reasonable suspicion should be the proper standard for subjecting suspects to the *Terry* detention that is involved in pursuit, the dissent contested the nonexistence of probable cause to pursue defendant Howard.⁷⁶

De Bour's sliding scale does not permit police to take any action beyond the level of simple inquiry absent some indicia of criminality.⁷⁷ In light of the majority's finding that no such indicia existed, it is irrelevant whether the court based its holding upon the requirement of probable cause or the lesser predicate of reasonable suspicion. However, future guidance of police officers and courts necessitates the court of appeals' establishment of one of these two standards as the requisite level of suspicion for pursuit of fleeing suspects. An examination of both *Howard* and the well-reasoned lower court decisions which have not followed the rule of *Howard* support the view that a police officer should be able to pursue a fleeing suspect upon reasonable suspicion.

72. *Id.* at 291-92, 300 N.Y.S.2d at 102. See also *Brown v. Texas*, 443 U.S. 47 (1979) (Texas stop-and-identify statute held to have been unconstitutionally applied where officers lacked reasonable suspicion of criminality).

73. 50 N.Y.2d at 590, 408 N.E.2d at 913, 430 N.Y.S.2d at 583.

74. *Id.* at 592, 408 N.E.2d at 914, 430 N.Y.S.2d at 585 (citing *Brown v. Texas*, 443 U.S. at 50).

75. *Id.* This inference is based upon the consistency of language with that used in *Terry*. See, e.g., 392 U.S. at 16, 32-33 (Harlan, J., concurring).

76. *Id.* at 595, 408 N.E.2d at 916, 430 N.Y.S.2d at 587. The dissent argued that "once [the] defendant ran away, the officers' level of suspicion was elevated to one of probable cause" *Id.*

77. See *supra* notes 53-57 and accompanying text for a synopsis of *De Bour's* sliding scale.

Since *Howard*, courts applying the more stringent standard of probable cause either have found pursuit justified on such ground⁷⁸ or have found no justification for pursuit,⁷⁹ at times in apparent disregard of the totality of circumstances.⁸⁰ Among cases in the former category, *People v. Valo*⁸¹ is illustrative of the confusion created by *Howard*. In *Valo*, the court reiterated *Howard's* characterization of pursuit in terms of "limited detention," yet stated that probable cause was the requisite for lawful pursuit of a fleeing suspect.⁸²

In contrast to those cases adhering strictly to *Howard's* holding, other courts have held that reasonable suspicion is an adequate justification for pursuit.⁸³ One such case is *People v. Berry*.⁸⁴ In *Berry*, three police officers were riding in a marked car through a high drug traffic area when they spotted the defendant, a "known" drug dealer,⁸⁵ and

78. See, e.g., *People v. Chestnut*, 91 A.D.2d 981, 457 N.Y.S.2d 573 (2d Dep't 1983) (probable cause existed where defendants in subway station fled upon approach of officer, leaving behind several large packages of clothing and radios); *People v. Mayes*, 90 A.D.2d 879, 456 N.Y.S.2d 531 (3d Dep't 1982) (arrest upon probable cause where defendant, who matched radio description of robber, fled when he saw police officer); *People v. Casado*, 83 A.D.2d 385, 444 N.Y.S.2d 920 (1st Dep't 1981) (probable cause justified pursuit of defendant where pre-existing reasonable suspicion was augmented by defendant's throwing bag at officer, exclaiming "Oh, God" and running off).

79. See *infra* notes 97-98 and accompanying text in regard to the need to consider the totality of the circumstances in each case.

80. See, e.g., *People v. Eaddy*, 78 A.D.2d 761, 433 N.Y.S.2d 635 (4th Dep't 1980). In *Eaddy*, the court held that police responding to an anonymous tip that suspects possessed heroin lacked probable cause to chase and frisk a defendant who jumped over a porch railing and began to run with his hand in a jacket pocket, later found to contain a pistol. The court paralleled the ambiguity of *Howard* by phrasing its holding in terms of probable cause, while characterizing pursuit as a "limited detention." *Id.* at 761, 433 N.Y.S.2d at 636 (citing *Howard* at 592, 408 N.E.2d at 914, 430 N.Y.S.2d at 585); cf. *People v. Butler*, 90 A.D.2d 797, 797-98, 455 N.Y.S.2d 647, 649 (2d Dep't 1982) (citing *Howard*, the court did not refer to any specific level of suspicion, yet held officer unjustified in response to woman shouting "they're over there; they're the ones," in pursuing and detaining fleeing suspects).

81. 92 A.D.2d 1004, 461 N.Y.S.2d 507 (3d Dep't 1983) (probable cause, based upon nervous manner and flight of burglary suspect, justified pursuit and arrest).

82. *Id.* at 1005, 461 N.Y.S.2d at 509; accord *Eaddy*, *supra* note 67.

83. See, e.g., *People v. Rosario*, 94 A.D.2d 329, 331, 465 N.Y.S.2d 211, 213 (2d Dep't 1983) (car leaving vicinity of burglary at high rate of speed without its lights on created reasonable suspicion justifying stop); *People v. Seward*, 91 A.D.2d 1005, 1005, 457 N.Y.S.2d 869, 870 (2d Dep't 1983) (pursuit of suspect in car was justified based upon reasonable suspicion); see also discussion of *People v. Lopez*, 94 A.D.2d 627, 462 N.Y.S.2d 28 (1st Dep't 1983), *infra* note 97.

84. 87 A.D.2d 53, 451 N.Y.S.2d 79 (1st Dep't 1982) (3-2 decision).

85. *Berry* had been arrested several times for drug dealing. *Id.* at 55, 451 N.Y.S.2d at 80. However, as the dissent pointed out, "a prior arrest record itself [cannot] lead to the conclusion that *Berry* was engaged in criminal activity." *Id.* at 60, 451 N.Y.S.2d at 83.

asked to speak to him. As one officer exited the car, Berry fled and the officer chased him. While being pursued, the defendant reached into his waistband and threw away an object, which was found to be a gun. Berry was thereafter apprehended and arrested on weapons charges.⁸⁶ It can be argued that the result in *Berry* was obtained precisely through the kind of reasoning that was lacking in *Howard*.

The dissent condemned the officer's actions as lacking the necessary probable cause mandated by *Howard*.⁸⁷ The majority attacked the dissent's failure "to note the distinction between an arrest and a seizure incident to a street encounter."⁸⁸ Thus, the court categorized the police conduct as a *Terry* interference, whose predicate was reasonable suspicion rather than probable cause. Furthermore, the opinion emphasized that the "defendant's flight [was] a highly relevant circumstance in the context of the fact pattern here presented"⁸⁹

It is suggested that *Berry* represents the proper approach to situations involving fleeing suspects in the absence of probable cause. First, there should be no doubt that the "detentive" nature of pursuit⁹⁰ is exactly the kind of police interference contemplated by *Terry*. Consequently, reasonable suspicion should be the applicable requisite for pursuit. Second, by attributing significance to Berry's flight in light of the totality of the circumstances,⁹¹ the court avoided obtaining as "absurd" a result as that reached in *Howard*.⁹² Although no single fact independently indicated criminal behavior, the entire context of events reasonably warranted suspicion of such behavior.⁹³ The court

86. *Id.* at 55, 451 N.Y.S.2d at 93.

87. *Id.* at 61, 451 N.Y.S.2d at 82-83. Similar to the majority opinion in *Howard*, the *Berry* dissent refused to recognize the existence of indicia of criminal behavior. *Id.*

88. *Id.* at 56, 451 N.Y.S.2d at 81.

89. *Id.* at 57, 451 N.Y.S.2d at 81.

90. See *supra* note 74 and accompanying text in regard to *Howard*'s characterization of pursuit.

91. See 87 A.D.2d at 57, 451 N.Y.S.2d at 81. This attribution comports with the Supreme Court's view that "flight at the approach of . . . law officers [is] strong indicia of *mens rea*." *Sibron*, 392 U.S. at 66.

The *Berry* court considered the "kaleidoscope street scene." 87 A.D.2d at 56, 451 N.Y.S.2d at 81. It is well-settled that the "whole picture" must be taken into account. See *supra* notes 16 & 25 and accompanying text regarding the finding of reasonable suspicion. Cf. *People v. Love*, 92 A.D.2d 551, 553, 459 N.Y.S.2d 122, 125 (2d Dep't 1983) (a court should consider "complete picture" surrounding a street encounter).

92. See *supra* note 70 regarding the *Howard* dissent.

93. The court apparently found such suspicion to be "'objective and susceptible of articulation,'" 87 A.D.2d at 56, 451 N.Y.S.2d at 81 (quoting *People v. Stewart*, 41 N.Y.2d 65, 66, 359 N.E.2d 379, 381, 390 N.Y.S.2d 870, 871 (1976)), unlike what the *DeBour* court termed "mere whim, caprice or idle curiosity." 40 N.Y.2d at 217, 352 N.E.2d at 567, 386 N.Y.S.2d at 381.

of appeals has observed that "[t]o a very large extent what is unusual enough to call for inquiry must rest in the professional experience of the police."⁹⁴ Similarly, the Supreme Court observed in *United States v. Cortez* that "a trained officer draws inferences and makes deductions . . . that might well elude an untrained person" and raise an officer's "suspicion that the particular individual . . . is engaged in wrongdoing."⁹⁵

While it may be argued that the *Berry* court would have found the officers' conduct in *Howard* permissible, such speculation should be avoided, as "criminal cases defy classification by categories."⁹⁶ Apparently indistinguishable facts properly may yield divergent results because of the inherent uniqueness of each case.⁹⁷ However, in reaching different outcomes on a case-by-case basis,⁹⁸ courts must apply the same standards. Thus, the court of appeals must resolve the confusion regarding when a police officer properly can pursue a fleeing suspect. To conform to *Terry*, its progeny,⁹⁹ New York's Criminal Procedure Law¹⁰⁰ and common sense, it is suggested that the court establish reasonable suspicion as the appropriate requisite for pursuit.

94. See *People v. Rosemond*, 26 N.Y.2d 101, 104, 257 N.E.2d 23, 25, 308 N.Y.S.2d 836, 839 (1970). "The police can and should find out about unusual situations they see, as well as suspicious ones." *Id.*

95. 449 U.S. at 418.

96. *People v. Prochilo*, 41 N.Y.2d 759, 763, 363 N.E.2d 1380, 1382, 395 N.Y.S.2d 635, 637 (1977).

97. "Because the totality of the circumstances in each case is necessarily unique, there should be no expectation that comparable significance will always attach to the same or similar factors in different cases." *Id.* at 762, 363 N.E.2d at 1381, 395 N.Y.S.2d at 636.

A recent case with facts similar to *Howard*'s illustrates this point. In *People v. Lopez*, 94 A.D.2d 627, 462 N.Y.S.2d 28 (1st Dep't 1983), police observed the defendant at night, running with what appeared to be a woman's pocketbook and continually looking back over his shoulder. Lopez crouched behind a car, at which time the police sounded their siren. The defendant walked away briskly, ignoring instructions to halt. When police "apprehended [him], both he and the police officer fell to the icy sidewalk and, upon impact," drug paraphernalia spilled from the defendant's bag. *Id.*, at 627, 462 N.Y.S.2d at 29. The court found that the "temporary detention" was sanctioned by reasonable suspicion. *Id.* at 628, 462 N.Y.S.2d at 30. Although the exigencies for pursuing Lopez undoubtedly were greater than those present in *Howard*, such a distinction between the two cases largely would vanish if, erroneously, one were to attempt to categorize these cases on the basis of their similar facts.

98. It is beyond cavil that street encounters necessitate a case-by-case approach by the courts. See *People v. Green*, 35 N.Y.2d 193, 195, 318 N.E.2d 464, 464, 360 N.Y.S.2d 243, 244 (1974)(whether police officer acts reasonably "must necessarily turn on the facts in each individual case").

99. See *supra* notes 19-51 and accompanying text for a discussion of these cases.

100. See *supra* note 12 and accompanying text for a discussion of this statute.

B. The Anonymous Tip

Under the rubric of anonymous tips,¹⁰¹ New York courts have failed to resolve adequately the issue of the extent to which a police officer may act upon information of unverified reliability. Problems in this area relate to the grey area between the common-law right of inquiry and *Terry* interferences.¹⁰² Before narrowing the focus of this section to anonymous tips in the context of New York stop-and-frisk law, a general overview of traditional use of anonymous tips is useful.

1. Traditional Use of Anonymous Tips

Until recently, the Supreme Court had not determined when police could use an anonymous tip to establish probable cause.¹⁰³ *Illinois v. Gates*¹⁰⁴ provided the Court with a vehicle to resolve this issue. In *Gates*, the Court abandoned its often criticized "two-pronged test,"¹⁰⁵ established by its decisions in *Aguilar* and *Spinelli*.¹⁰⁶ The test was used to evaluate the veracity and basis of knowledge¹⁰⁷ of individuals providing hearsay information to establish probable cause. Instead, the *Gates* Court "reaffirm[ed] the totality of the circumstances analysis that traditionally has informed probable cause determinations,"¹⁰⁸ deeming it more flexible and easily applied than the *Aguilar-Spinelli* approach.¹⁰⁹ As the Court observed, there were inherent impracticali-

101. See *supra* note 4 for a definition of anonymous tip.

102. See *supra* notes 59-60 and accompanying text for a discussion of this grey area.

103. Comment, *Anonymous Tips, Corroboration and Probable Cause: Reconciling the Spinelli/Draper Dichotomy in Illinois v. Gates*, 20 Am. Crim. L. Rev. 99, 99 (1982).

104. 51 U.S.L.W. 4709 (1983) (anonymous letter to police department, containing detailed information concerning plans of alleged drug couriers, held to constitute probable cause for issuance of search warrant where police independently corroborated such non-incriminating facts).

105. *Id.* at 4716 n.11. Generally, criticism had focused on the test's rigidity. *Id.*

106. *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964).

107. *Aguilar*, 378 U.S. at 113-15.

108. 51 U.S.L.W. at 4716 (citing *United States v. Ventresca*, 380 U.S. 102 (1965); *Jones v. United States*, 362 U.S. 257 (1960); *Brinegar v. United States*, 338 U.S. 160 (1949)).

109. 51 U.S.L.W. at 4716. "The task of the issuing magistrate is simply to make a practical, common-sense decision whether," in light of all the facts supplied to him, including the "veracity" and "basis of knowledge" of informants, probable cause exists. *Id.*

In marginal cases, a preference should be accorded to the issuance of warrants to encourage police use of the warrant process and to limit the scope of searches. 51 U.S.L.W. at 4715 (citing *Ventresca*, 380 U.S. at 109). At least to the extent that these

ties in applying the two-pronged test to anonymous informants.¹¹⁰ Nevertheless, by overruling the *Aguilar-Spinelli* test, *Gates*' simplified approach to hearsay information became applicable to tips of all informants, both known¹¹¹ and unknown¹¹².

Gates reaffirmed the rule of *Draper v. United States*,¹¹³ which permits a finding of probable cause based upon independent police corroboration of innocent details when a tip from an informant whose basis of knowledge is unknown describes facts with minute particularity.¹¹⁴ In effect, such particularity causes a tip to be self-verifying under *Draper*.¹¹⁵ In *People v. Elwell*, the court of appeals severely limited *Draper*'s application in the context of warrantless searches and arrests in New York.¹¹⁶ The court ruled that such a search or arrest will be sustained only when the details of a tip from an informant whose basis of knowledge¹¹⁷ is unknown are at least suggestive of criminal conduct.¹¹⁸

2. Anonymous Tips as a Basis for Stop and Frisk

In contrast to New York's strict view regarding the use of unverified information in the context of warrantless interferences requiring prob-

rationales are inapplicable to *Terry* interferences, no such preference should extend to police in marginal stop-and-frisk situations.

110. *Id.* at 4715-16. The Court observed that "anonymous tips seldom could survive a rigorous application of either" part of the two-pronged test, since, for example, the veracity of an unknown informant is, by definition, largely undeterminable. *Id.* at 4716.

111. For a discussion of known or "confidential" informants, see *McCray v. Illinois*, 386 U.S. 300, 304 (1967).

112. See *supra* note 4 concerning anonymous informants. New York has not yet had occasion to consider *Gates* in light of its own constitution. See *supra* note 51.

113. 358 U.S. 307 (1959).

114. U.S.L.W. at 4717 (applying *Draper v. United States*, 358 U.S. 307 (1959)). Innocent or noncriminal details, as opposed to incriminating or criminal details, do not relate to the crime itself.

115. See *People v. Elwell*, 50 N.Y.2d 231, 239-40, 406 N.E.2d 471, 476, 428 N.Y.S.2d 655, 661 (1980) (4-3 decision).

116. *Id.* at 242, 406 N.E.2d at 478, 428 N.Y.S.2d at 662 (independent corroboration of innocent details insufficient to establish probable cause for warrantless search of car). See also *Warden v. Hayden*, 387 U.S. 294 (1967) (exigent circumstances may create exception to warrant requirement).

117. *Elwell*'s vitality arguably is uncertain, in light of its heavy reliance upon *Aguilar*'s basis of knowledge prong and *Gates*' abandonment of the two-pronged test. See *supra* notes 104-14 for a discussion of *Gates*.

118. 50 N.Y.2d at 241, 406 N.E.2d at 477, 428 N.Y.S.2d at 662. In its rationale, the court cited inconsistent application of *Draper* and the problem of "hindsight inclusion [by police] of observed physical characteristics or movements." *Id.* However, where a magistrate is interposed, the *Draper* rule remains viable. *Id.*

able cause,¹¹⁹ the court of appeals has taken a more liberal approach to the use of anonymous tips in the realm of stop and frisk.¹²⁰ However, questions remain as to the reasonableness and practicality of this approach.

The Supreme Court twice has denied certiorari on the issue of whether anonymous tips can establish reasonable suspicion for *Terry* interferences.¹²¹ Consequently, the United States Courts of Appeals¹²² and the states¹²³ remain divided on this question.¹²⁴ Dicta in *Adams v. Williams*¹²⁵ represents the most significant, although scant, Supreme Court commentary. In *Adams*, the Court commented that the prosecution's case would have been weaker if the tip had been anonymous.¹²⁶ Similarly, the New York Court of Appeals expressed its disfavor for anonymous tips in *De Bour*, characterizing them as being "of the weakest sort."¹²⁷ Nevertheless, in *People v. Kinlock*,¹²⁸ New York sanctioned a permissive approach to the use of anonymous tips in establishing reasonable suspicion.¹²⁹

In *Kinlock*, the court of appeals upheld a frisk based upon police corroboration of innocent details contained in an anonymous tip.¹³⁰

119. See *supra* notes 116-18 and accompanying text regarding *Elwell's* strict construction of *Draper*.

120. See *infra* notes 129-34 and accompanying text. But see *infra* notes 135-44 and accompanying text for an apparently conflicting line of cases.

121. See *White v. United States*, 648 F.2d 29 (D.C. Cir.), *cert. denied*, 454 U.S. 924 (1981); *Louisiana v. Jernigan*, 377 So.2d 1222 (Sup. Ct. La. 1979), *cert. denied*, 446 U.S. 958 (1980). In each case, reasonable suspicion based upon an anonymous tip was upheld.

122. See *White*, 454 U.S. at 925-26 (White, J., dissenting) for citations representing the "widely divergent positions" of the federal courts of appeal.

123. *Id.* at 926 n.2 (citations representing divergence of state courts).

124. See Note, *Stop and Frisk Based Upon Anonymous Telephone Tips*, 39 WASH. & LEE L. REV. 1437 (1982) (thorough constitutional analysis of this issue).

125. 407 U.S. 143 (1972). See *supra* notes 39-42 and accompanying text for a discussion of *Adams*.

126. See 407 U.S. at 146.

127. See 40 N.Y.2d at 224, 352 N.E.2d at 573, 386 N.Y.S.2d at 386.

128. 43 N.Y.2d 832, 373 N.E.2d 372, 402 N.Y.S.2d 573 (1977) (frisk justified based upon anonymous tip describing six-foot black man named "Leroy" wearing particularly described coat and possessing gun at specific location when defendant responded to name "Leroy").

129. *Id.* at 833, 373 N.E.2d at 373, 402 N.Y.S.2d at 574. In dissent, Judge Fuchsberg admonished that "[t]o permit a 'pat-down' or search on no more than an anonymous [tip] . . . would be to expose innocent individuals to intrusion on their persons whenever malicious and unidentifiable tipsters accompany their false accusations with accurate descriptions of the targets they choose to name." *Id.* at 834.

130. See *supra* note 128 for the facts of *Kinlock*.

Similarly, in *People v. McLaurin*,¹³¹ the court held that police were justified in immediately frisking the defendant, who matched an anonymous caller's detailed description of a man with a gun.¹³² The most recent court of appeals decision in this line of cases is *People v. Fernandez*,¹³³ in which the court found reasonable suspicion where police officers, responding to an anonymous tip concerning a man with a gun, spotted the defendant, who matched the description.¹³⁴

In apparent contrast to *Kinlock*, *McLaurin* and *Fernandez*, the court of appeals established a more restrictive line of cases through its decision in *People v. Stewart*.¹³⁵ In *Stewart* and its companion case, *People v. Williams*, the court distinguished two similar factual situations¹³⁶ on the basis of the specificity of detail contained in the tips and the fact that in *Williams*, the tip was handled personally by the arresting officer, who had recognized the defendant upon seeing

131. 43 N.Y.2d 902, 374 N.E.2d 614, 403 N.Y.S.2d 720 (1978), *rev'g* 56 A.D.2d 80, 392 N.Y.S.2d 1 (1st Dep't 1977) (reversed in appellate division on dissenting opinion of Nunez, J.).

132. 56 A.D.2d at 84, 392 N.Y.S.2d at 1-2.

133. 58 N.Y.2d 791, 445 N.E.2d 639, 459 N.Y.S.2d 256 (1983).

134. *Id.* at 792, 445 N.E.2d at 640, 459 N.Y.S.2d at 257. Upon seeing the defendant, an officer immediately touched his hand, which held a shirt, and felt a hard object, which turned out to be a gun. *Id.*

People v. Olsen, 93 A.D.2d 824, 460 N.Y.S.2d 828 (2d Dep't 1983), is illustrative of this line of cases. In *Olsen*, a frisk was upheld where the defendant matched a detailed description of a man with a gun in a bar. *See also*, *People v. Sustr*, 73 A.D.2d 582, 423 N.Y.S.2d 166 (1st Dep't 1979) (pat-down justified where police made visual confirmation of physical details of suspect, described by anonymous caller as wearing silver jacket, standing on street corner and being "out to kill people").

135. 41 N.Y.2d 65, 359 N.E.2d 379, 390 N.Y.S.2d 870 (1976) (*People v. Williams*, companion case).

136. In *Williams*, a police officer personally received an anonymous call describing a " 'little dude' wearing a black overcoat and black hat" whose name was Donald and who was "standing in front of the Super Fly Bar . . . 'packing a weapon.'" Upon arriving at the specified location, the officer recognized Donald Williams as someone he had questioned recently. The officer observed a bulge under Williams' coat, frisked him, and seized a gun from the location of the bulge. The frisk was upheld. *Id.* at 67, 359 N.E.2d at 381, 390 N.Y.S.2d at 872.

In *Stewart*, the arresting officer received a radio message that a black man wearing a long green coat and armed with a gun was standing at a particular street location. At the scene, the patrolman spotted Stewart wearing an unbuttoned long green coat and standing among four or five other men. When called, Stewart walked toward the officer, who noticed a bulge in one of Stewart's front trouser pockets. The patrolman immediately touched the pocket, felt a hard cylindrical object, and extracted eight bullets. A subsequent frisk yielded a loaded revolver concealed in a shoulder holster. The court held that the officer's conduct had been unreasonable and suppressed the evidence. *Id.* at 68, 359 N.E.2d at 381, 390 N.Y.S.2d at 872-73.

him.¹³⁷ The court in *Stewart* rejected a finding of reasonable suspicion based upon the anonymous tip supplied. Relying upon its dicta in *La Pene* and that contained in *Adams*, the court held that an anonymous tip "will not of itself constitute reasonable suspicion thereby warranting a stop and frisk of anyone who happens to fit that description."¹³⁸ Rather, the court ruled that a tip reporting an armed suspect at a particular location generates "only the common-law power to inquire for purposes of maintaining the *status quo* until additional information can be acquired."¹³⁹

The *Stewart* rule has been reiterated by the court of appeals. In *People v. Benjamin*,¹⁴⁰ a unanimous court rejected the notion that "an anonymous tip of 'men with guns', standing alone . . . justif[ies] intrusive police action, and certainly does not rise to the level of reasonable suspicion warranting a stop and frisk."¹⁴¹ Most recently, the influential case of *People v. Klass*¹⁴² was interpreted¹⁴³ as recognizing implicitly the importance of police observations, in addition to an anonymous tip, in establishing reasonable suspicion.¹⁴⁴

Thus, on one hand, the court of appeals has sanctioned the use of sufficiently detailed anonymous tips as the sole predicate for a stop and frisk.¹⁴⁵ On the other hand, the court has held that generalized anonymous tips concerning armed persons generate no more than the common-law right of inquiry.¹⁴⁶ Arguably, these two lines of decisions harmonize in that *sufficient detail* is the predicate for an anonymous tip to establish reasonable suspicion. However, as a practical matter,

137. *Id.* at 69, 359 N.E.2d at 383, 390 N.Y.S.2d at 873.

138. *Id.* at 69, 359 N.E.2d at 382, 390 N.Y.S.2d at 873.

139. *Id.*

140. 51 N.Y.2d 267, 414 N.E.2d 645, 434 N.Y.S.2d 144 (1980) (frisk justified where officers responding to anonymous tip reporting armed men at specified location observed defendant, who was standing among approximately thirty people, step backward toward curb while reaching under his jacket toward rear of his waistband).

141. *Id.* at 270, 414 N.E.2d at 647, 434 N.Y.S.2d at 145.

142. 55 N.Y.2d 821, 432 N.E.2d 135, 447 N.Y.S.2d 433 (1981) (frisk of defendant matching description of man with gun deemed reasonable when defendant would not reveal his name to inquiring officers).

143. See *People v. Carney*, 58 N.Y.2d 51, 444 N.E.2d 26, 457 N.Y.S.2d 776 (1982) (police did not have reasonable suspicion to frisk "suspicious" looking suspect who was pointed out to police by unknown informant while police were investigating a recent armed robbery attempt).

144. *Id.* at 54, 444 N.E.2d at 28, 457 N.Y.S.2d at 778.

145. See *supra* notes 129-34 and accompanying text concerning the more permissive line of cases.

146. See *supra* notes 135-44 and accompanying text concerning the more restrictive line of cases.

courts have evidenced confusion as to whether an anonymous tip can itself support a finding of reasonable suspicion.¹⁴⁷ Furthermore, assuming *arguendo* that a sufficiently detailed tip can itself justify a stop and frisk, it is not always clear how much detail is required.¹⁴⁸ The often life-threatening realities inherent in such cases¹⁴⁹ prompt the question of whether police officers should be required to "maintain the status quo" by exercising the common-law right of inquiry¹⁵⁰ when "the answer [to the question] might be a bullet."¹⁵¹ Given the Supreme Court's reluctance to address this question squarely,¹⁵² the burden has fallen upon the states to establish their own procedural guidelines conforming to the broad constitutional standard of reason-

147. See, e.g., *People v. Russ*, 91 A.D.2d 593, 596, 458 N.Y.S.2d 185, 187 (1st Dep't 1982) (Sandler, J., concurring). Justice Sandler there stated that the court of appeals never has rejected the notion that a sufficiently detailed anonymous tip may serve as the sole predicate for a frisk of an allegedly armed suspect. In dissent, Justice Milonas cited *Stewart* for the proposition that such a tip supports only the common-law right of inquiry. *Id.* at 598, 458 N.Y.S.2d at 189.

See also *People v. Foster*, 83 A.D.2d 282, 287, 443 N.Y.S.2d 835, 838 (1st Dep't 1981) (anonymous tip, standing alone, deemed insufficient to establish reasonable suspicion) (dictum); but see *People v. Seppinni*, 77 A.D.2d 852, 431 N.Y.S.2d 42 (1st Dep't 1980). In *Seppinni*, police received a tip that a black man at a bar wearing a beige suit with a flower in its lapel possessed a gun and was "hunting to shoot someone." The informant supplied his name and said he was calling from the bar. However, his identity never was verified. Upon seeing the defendant, who fit the description, the police frisked him and seized a gun. *Id.* at 852, 431 N.Y.S.2d at 43. The court upheld the frisk. *Id.* In dissenting, Justice Fein characterized the case as being "almost on all fours with" *La Pene*, except for the physical descriptions of the defendants in each case. *Id.* See *supra* note 53 for a discussion of *La Pene*. "These differences in style of clothing," he stated "are hardly of constitutional significance." *Id.* at 853, 431 N.Y.S.2d at 44.

148. *Id.*

149. In "evaluating the propriety and reasonableness of the actions taken by the police, [courts] must take cognizance of the realities of urban life in relation to the dangers to which officers are exposed daily, which often require split-second decisions, with life or death consequences." *People v. Reyes*, 91 A.D.2d 935, 936, 457 N.Y.S.2d 829, 831 (1st Dep't 1983).

150. See *supra* notes 135-40 and accompanying text regarding *Stewart* and related cases.

151. *Terry*, 392 U.S. at 33 (Harlan, J., concurring). "It would, indeed, be absurd to suggest that a police officer must await the glint of steel before he can act to preserve his safety." *People v. Benjamin*, 51 N.Y.2d 267, 271, 414 N.E.2d 645, 648, 434 N.Y.S.2d 144, 146 (1980).

It should be noted that observation of behavior possibly indicative of criminality may substitute for actual verbal inquiry in raising the level of suspicion to warrant a stop and frisk. See *Benjamin*, 51 N.Y.2d at 270, 414 N.E.2d at 647, 434 N.Y.S.2d at 146.

152. See *supra* notes 106-08 and accompanying text concerning the Court's denial of certiorari on this issue.

ableness while remaining functional as reasonably safe and effective tools of law enforcement.¹⁵³ Arguably, New York has failed to establish this type of a reasonable and workable approach to anonymous tips.¹⁵⁴

3. Recommendations

While tips of known origin may vary greatly in their reliability,¹⁵⁵ anonymous tips are uniformly "presumptively unreliable" in nature.¹⁵⁶ The only factors distinguishing one tip from another are the degree of detail and the seriousness of the criminal activity alleged.¹⁵⁷ Yet, there is no rational basis to assume that a highly detailed tip concerning extremely dangerous criminal conduct is more reliable than a tip that is less specific and urgent in nature. A malicious tipster easily can tailor his tip to meet these requirements.¹⁵⁸ However, common sense dictates that "personal and public safety may well mandate a more intensive police intrusion" under more urgent circumstances.¹⁵⁹ It therefore is suggested that in cases involving anonymous tips of dangerous criminal activity, police should have an automatic right to stop a suspect who reasonably can be identified from the description given.¹⁶⁰ Furthermore, if an anonymous tip states that a suspect is armed, a qualified automatic right to frisk should arise. The qualifications are two-fold. First, to avoid pretextual frisks, in no case

153. See generally *Stop and Frisk Based Upon Anonymous Tips*, *supra* note 124, at 1447-48. The author cites as an example the leading New Jersey decision, *In re H.B.*, 75 N.J. 243, 381 A.2d 759 (1977), in which the court upheld a frisk based upon an anonymous tip that included an accurate description of the defendant and a description of conduct (man with gun) sufficiently dangerous to subject the police officer to a serious risk of harm.

154. See *supra* notes 147-48 and accompanying text concerning the specific problems with New York case law.

155. Cf. *Adams*, 407 U.S. at 147.

156. See *Anonymous Tips, Corroboration, and Probable Cause*, *supra* note 103, at 107. See also *supra* notes 126-27 and accompanying text concerning courts' disfavor for anonymous tips.

157. Cf. *De Bour*, 40 N.Y.2d at 225, 352 N.E.2d at 573, 386 N.Y.S.2d at 386.

158. See *supra* note 129 concerning falsified tips.

159. *Id.* Stop-and-frisk scenarios often involve "emergency situations where the difference between life and death is often measured in seconds. . . ." *Chestnut* at 21, 409 N.E.2d at 961, 431 N.Y.S.2d at 489. "[T]he police officer is experiencing the dangers of the real world where the Marquis of Queensbury rules do not apply." *People v. Rivera*, 78 A.D.2d 327, 331, 434 N.Y.S.2d 681, 684 (1st Dep't 1981).

160. See *Terry*, 392 U.S. at 33 (Harlan, J., concurring) (Justice Harlan advocated automatic frisk under such circumstances). See *supra* note 32 and accompanying text for the same proposition.

should the fruits of such a frisk be admissible unless a gun, knife or other weapon described in the stop-and-frisk statute is seized contemporaneously. Second, as a constitutional safety valve, such a presumption of reasonable suspicion should not be sustained under circumstances clearly inconsistent with the paramount concern of reasonableness.¹⁶¹

As the District of Columbia Circuit observed in *United States v. White*,¹⁶² fear of retaliation often prompts informants to remain anonymous, yet police must have the ability to act on the information they provide.¹⁶³ "In an antiseptic world," the court remarked, police officers might achieve their purpose by "politely" conversing with suspects. But "in our tarnished one," police must proceed more intrusively.¹⁶⁴

IV. Conclusion

Two of the most problematic areas of stop-and-frisk law in New York are police pursuit of fleeing suspects and the use of anonymous tips. Resolution of the issue of pursuit requires the New York Court of Appeals to recognize reasonable suspicion as the level of suspicion necessary to justify pursuit, and to abandon its ambiguously imposed standard of probable cause. Resolution of the anonymous tips issue, in the absence of Supreme Court guidance, requires the court of appeals to provide police officers and lower courts with clear and practical guidelines for responding to unverified information. Tips pertaining to dangerous criminal activity generally should serve as the predicate for a stop when the suspect can be identified with reasonable certainty. Furthermore, a qualified right to frisk should arise if the tip indicates that the suspect is armed.

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161. See *supra* note 33 and accompanying text concerning the fourth amendment's reasonableness standard.

162. 648 F.2d 29 (D.C. Cir.), *cert. denied*, 454 U.S. 924 (1981). See *supra* notes 121-24 and accompanying text for a discussion of *White*.

163. *Id.* at 44. Although *White* concerned narcotics trafficking, such activity is arguably of sufficiently dangerous nature to justify a stop under the proposed procedural guidelines. See *supra* note 32 concerning the violent nature of the drug trade.

164. *Id.* at 45.

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